United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 77-7238

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANK SANTORA and JOHN S. IANNONE,

Plaintiffs-Appellants,

-against-

THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK; ALPHONSE D. D' AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION; ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS; and HARRISON J. GOLDIN, COMPTROLLER,

Defendants-Appellees.

B

P/S

ON APPEAL FROM AN ORDER AND JUDEMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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November 18, 1977

A. Daniel Fusaro, Clerk
United States Court of Appeals
For the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Santora v. Civil Service Commission,
Docket No. 77-7238

Dear Sir:

The appellees' brief in the above-titled case was filed without a table of authorities. I have prepared a table of authorities and request permission to file 11 copies as a supplement to our brief. Three copies have been furnished to my opposing counsel.

The clerk has suggested that the table be inserted in the filed copies of the brief without re-binding. If the Court does require re-binding of the briefs, we will promptly comply.

I apologize to the Court for the inconvenience this procedure may cause.

Very truly yours,

Francis F. Caputo

Francis F. Caputo

cc: Jeremiah B. McKenna
Attorney for Appellents

enc.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANK SANTORA and JOHN S. IANNONE,

Plaintiffs-Appellants,

-against-

THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK; ALPHONSE E. D'AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION; ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS; and HARRISON J. GOLDIN, COMPTROLLER,

Defendants-Appellees.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

Preliminary Statement

Plaintiffs appeal from an order and judgment of the United States District Court for the Southern District of New York (Werker, J.), entered April 12, 1977, which dismissed their complaint brought under 42 U.S.C. §§1981 and 1983, and other statutes, because it was barred by the controlling statute of limitations. Among the statutes said to confer jurisdiction on the court to hear the claims were 28 U.S.C. §1343(3) and 28 U.S.C. § 1331.

Plaintiffs alleged that they had been demoted from their tenured public employment positions without any

due process procedures, in violation of their rights under the Fifth and Fourteenth Amendments of the Constitution.

Questions Presented

This action was commenced three years and four months after the cause of action accrued.

1. Was the action, in so far as it was brought pursuant to 42 U.S.C. §§1981 and 1983, time-barred?

The District Court held that the action was time-barred by the applicable three-year statute of limitations.

2. Did the District Court have the power to create a cause of action based directly upon the Fourteenth Amendment, and, assuming it did possess such power, should it have been exercised to create a cause of action for money damages against the defendant Civil Service Commission, a governmental body of the City of New York, which has been held immune from suit under 42 U.S.C. §1983?

The district Court held that it did not possess such power.

3. Assuming, arguendo, that a claim for relief was properly stated directly under the 14th Amendment, was such a claim time-barred by the applicable statute of limitations?

The District Court suggested that such a claim, if it existed, would not be time-barred.

Facts

(1)

Plaintiffs alleged that they, as employees of the City of New York, had taken and passed civil service promotional examinations for the position of District Foreman (Highway Maintenance). On September 18, 1971, plaintiffs were promoted to that position, with a resulting salary increase of $2,500. Plaintiffs alleged that on March 17, 1972, their probationary period in the position of District Foreman (Highway Maintenance) expired and they then acquired tenure in that position (7).*

Plaintiffs were notified in November, 1972, that the defendant Civil Service Commission had determined that their former positions with the City were not eligible positions for promotion to District Foreman (Highway Maintenance). On December 6, 1972, plaintiffs were notified that their promotions were revoked and that they were reassigned to their former civil service positions (8).

Plaintiffs claim that their demotion resulted from a dispute by a rival union over the proper chain of promotion for the position of District Foreman (Highway Maintenance). Plaintiffs alleged that they had no notice of this dispute nor were they allowed to intervene or argue in their own behalf before the

*Numbers in parentheses refer to pages in the Joint Appendix.

Civil Service Commission (8).

Plaintiffs claim that they had acquired a property interest in their positions as District Foreman (Highway Maintenance) and could not be removed from that position without "a meaningful hearing" (10). Plaintiffs also claim that the decision to restrict eligibility for promotion to District Foreman (Highway Maintenance) to persons in job classifications represented by a rival union was "arbitrary, capricious, unreasonable" and deprived plaintiffs of "procedural due process and equal protection of the laws" (10).

In their prayer for relief, plaintiffs asked for a judgment declaring the action of the defendants to be in violation of their constitutional rights to due process and equal protection of the laws. Plaintiffs asked that the determination to demote them to their former positions be set aside and that they be reinstated to the higher position, with back pay, plus damages of $20,000 (11).

Defendants moved to dismiss the complaint pursuant to Rule 12 of the Rules of Civil Procedure upon the ground that the action was barred by the three year statute of limitations held applicable to actions brought under 42 U.S.C. §1983*.

*Defendants also claimed that the action was barred by the doctrine of res judicata. That branch of the motion to dismiss was denied by the District Court and is not urged on this appeal as a ground for an affirmance.

Judge Werker held that the statute of limitations applicable to actions brought under 42 U.S.C. §1983 is the three year period for actions "to recover upon a liability, penalty or forfeiturre created or imposed by statute", found in New York CPLR 214, subd. 2. Judge Werker cited five decisions of this Circuit as authority for this proposition. Since the instant action was commenced more than three years after the cause of action accrued, the Court dismissed the §1983 claim as time-barred.

The Court next considered whether plaintiff could state a claim for relief against the City of New York* directly under the Fourteenth Amendment, with jurisdiction predicated upon 28 U.S.C. §1331. The Court thought that if such a claim could be stated, the appropriate statute of limitations to be applied would be the six-year period contained in New York CPLR 213, subd. 1, which applies to actions for which no period of limitations is specifically prescribed by law. However, after discussing the issue at length, the Court concluded that it did not have the power to base an action directly upon the Fourteenth Amendment and therefore, it dismissed the complaint.

*There seems to have been tacit agreement among the Court and parties that there was no distinction between the defendant Civil Service Commission and the City of New York for the purposes of the issues here under review.

POINT I

INSOFAR AS PLAINTIFF'S CLAIMS ARE BROUGHT UNDER 42 U.S.C. §§1981 AND 1983, THEY ARE TIME-BARRED BY THE WELL-ESTABLISHED RULE IN THIS CIRCUIT APPLYING A THREE-YEAR STATUTE OF LIMITATIONS.

ASSUMING, ARGUENDO, THAT A CLAIM WAS STATED HERE DIRECTLY UNDER THE FOURTEENTH AMENDMENT, IT TOO WOULD BE TIME-BARRED WHEN CPLR 217, THE MOST APPROPRIATE STATE STATUTE OF LIMITATIONS, IS APPLIED.

(1)

Where Congress has created no specific statute of limitations for a federal cause of action, the federal court must apply the most appropriate limitation period existing under state law. For example, in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), the Supreme Court held that in the absence of a federal statute of limitations applicable to a cause of action under §1981, the controlling period would be the one-year period provided by Tennessee law. This Court, when faced with the question of the appropriate statute of limitations to be applied to a federal suit in New York under §1983, has repeatedly held that it is the three-year period derived from New York CPLR 214, subd. 2, for actions, "to recover, upon a liability, penalty or forfeiture created or imposed by statute". Meyer v. Frank, 550 F. 2d 726 (2d Cir., 1977); Kaiser v. Cohn, 510 F. 2d 282 (2d Cir., 1974); Rosenberg v. Martin, 478 F. 2d 520 (2d Cir., 1973), cert. denied, 414 U.S. 872 (1973); Rome v. Leary, 425 F. 2d 186 (2d Cir., 1970); Swan v.

Board of Education, 319 F. 2d 56 (2d Cir., 1963).

In Gross v. Revlon 548 F. 2d 405 , 407 (2d Cir., 1976), this Court accepted the same three-year period as the applicable statute of limitations in an action brought under §1981.*

In Swan, the Court rejected the contention, revived now by plaintiffs on this appeal, that the appropriate New York statute of limitations to be applied to a §1983 action would be the then ten-year period governing an action for which a limitations period is not specifically prescribed (See App's Br. in Swan, p. 2).**

Plaintiff presents no argument that should persuade this Court to reconsider its prior decisions. The arguments we advance infra in favor of an even shorter statute of limitations to govern the claim based directly under the 14th Amendment could be applied to the §1983 action as well. In our view, they militate in favor of a shorter limitations period than the three-year period established by this Court. We do not advance that contention here because of the strength of precedent applying the three-year period, and because it is unnecessary

*Plantiffs apparently rely primarily upon §1983 as basis for a statutory cause of action. Since there is no allegation in the complaint of racial discrimination, the claim under §1981 would appear to be unsupportable. See, Runyon v. McCrary, 427 U.S. 160, 168 (1976); Johnson v. Railway Express Agency, supra, 421 U.S. 454 459-460 (1975).

**In Swan, plaintiff sought to impose the ten-year period provided by C.P.A. §53. Plaintiffs here seek to apply the successor omnibus clause contained in CPLR 213(1), providing for a six-year period.

to decision of this case.

(2)

The District Court assumed that if a claim could be stated directly under the 14th Amendment, with jurisdiction based upon 28 U.S.C. §1331, the applicable statute of limitations would be the six-year period provided in CPLR 213(1). That statute applies to actions for which no specific period of limitations has been provided by law. We think the District Court's assumption was incorrect.

We have already noted the principle that where Congress has created no specific statute of limitations for a federal cause of action, the federal court must apply the most appropriate period of limitations existing under state law. In Swan, supra, the Court wrote that "the applicable period of limitations is that which New York would enforce had an action seeking similar relief been brought in a court of that state. 319 F. 2d at p. 59.

That approach was adopted by this Court in Fine v. City of New York, 529 F. 2d 70 (1975), when it was first faced with the problem of fashioning an appropriate statute of limitations for a claim founded directly upon the 14th Amendment. In Fine, the plaintiff's claim was based upon an illegal search and seizure conducted by New York City policemen. This Court concluded that the appropriate statute of limitations would be the one-year and ninety-day period governing tort claims against municipalities found in New York Gen. Mun. Law §50(i).

It is obvious that to arrive at this result, the Court had to identify the underlying state claim and apply the precise limitations period that a New York Court would apply if the action had been brought in the state forum.

We submit that in New York, plaintiffs would be compelled, in order to obtain the relief they seek, to bring a proceeding under CPLR Article 78 for a writ of mandamus. Plaintiffs essentially seek reinstatement to the position of District Foreman (Highway Maintenance) and back pay. In order to obtain reinstatement, plaintiffs must proceed under Article 78. Austin v. Board of Higher Educ. of the City of New York, 5 NY 2d 430, 441 (1959). Cf. Colodney v. New York Coffee Exch., 4 AD 2d 137 (1st Dept., 1957), aff'd without opinion, 4 NY 2d 698 (1958); Matter of Devens v. Gokey, 12 AD 2d 135 (4th Dept., 1961), aff'd without opinion, 10 NY 2d 898 (1961).

The statute of limitations in an Article 78 proceeding is the four-month period provided in CPLR 217. When the four-month begins to run depends upon whether the prayer for relief in fact involves a request for review of an exercise of administrative discretion, or instead, a demand that the public officer or body perform a ministerial duty specifically enjoined by law. Plaintiffs' claim is that they had an absolute right to a due process hearing before a decision was made to demote them from their tenured positions. In such

case, a duty mandated by law would be in issue, and the four-month limitation period would be measured from the date of refusal after demand made upon the public officer or body. Matter of Foy v. Brennan, 285 App. Div. 671, 672-673 (1st Dept., 1955); Nelson v. Kelly, 4 AD 2d 597, 598 (1st Dept., 1957). Plaintiffs do not allege in their complaint that they made a demand upon the defendants for reinstatement or for a hearing. Even if the commencement of this proceeding be considered the demand, the proceeding would still be time-barred in New York. When the demand is not reasonably prompt, laches would bar the action. Thomas v. City of New York, 263 N.Y. 402, 407 (1934). In Matter of Foy v. Brennan, supra, 285 App. Div. 671, 673, the Court stated:

> ". . .of course, regardless of time limitation statutes, the defense of laches remains available against suitors who have too long rested quiescent upon their rights. (Matter of Amsterdam City Hosp. v. Hoffman, 278 A.D. 292 (3rd Dept., 1951)."

Where one is entitled to relief upon demand, one may not unreasonably delay in making demand. In Matter of Devine v. Gokey, 12 AD 2d 135 (4th Dept., 1961), aff'd 10 NY 2d 898 (1961), the Court found that a delay of four months would bar the proceeding. The Court stated (12 AD 2d at p. 137):

> "The requirement of a prompt demand is part of the statutory scheme for the imposition of a

> short Statute of Limitations in Article 78 proceedings. The term does not refer to the equitable doctrine of laches. If there is an unexcused delay in making the demand, the four months' Statute of Limitations will be deemed to have begun to run at the time the demand should have been made. The problem in these proceedings is one of the equitable doctrine of laches and it is immaterial whether or not the delay caused any prejudices to the respondent." [emphasis added]

See, also, Amsterdam City Hospital v. Hoffman, 273, App. Div. 292 (3rd Dept., 1951) (four months delay held unreasonable); Central School District No. 2 v. New York State Teachers' Retirement System, 27 AD 2d 265 (3rd Dept., 1967), aff'd other grounds, 23 NY 2d 213 (1968) (ten month delay a bar to claim). Matter of Williams v. Pyrke, 233 App. Div. 345 (4th Dept., 1931) (two year delay held a bar to reinstatement. MacMaster v. Harvey, 239 App. Div. 553 (2nd Dept., 1933), aff'd 265 N.Y. 555 (1934) (three year delay held a bar to seek review of removal from office).

Appellants argue that because their claim is based upon an alleged constitutional violation, the applicable statute of limitations is the six-year period provided in CPLR 213(1). The argument and the cases cited in support, are not pertinent to the issue before this Court. New York does not have a specific statute of limitations for a cause of action based upon a constitutional violation. CPLR 213(1) applies only where

no specific period of limitations is provided by law. We have attempted to show that in New York, plaintiffs would be compelled to bring their action in the form of an Article 78 proceeding. CPLR 217 specifically provides the applicable statute of limitations. The possible applicability of other limitations periods is but an academic exercise. In the cases cited by appellants (App. Br., pp. 7-8), the particular causes of action involved did not have specific statutes of limitations governing them. This Court need not reach the question whether it can imply a cause of action based on the 14th Amendment, since, in any event, such an action would be time-barred when CPLR 217 is applied.

POINT II

THE COURTS ARE WITHOUT POWER TO IMPLY A CAUSE OF ACTION DIRECTLY FROM THE 14TH AMENDMENT. EVEN IF THE FEDERAL COURTS POSSESS THE POWER TO DO SO, THAT POWER SHOULD NOT BE EXERCISED TO IMPOSE LIABILITY UPON MUNICIPALITIES.

In Brault v. Town of Milton, 527 F. 2d 730 (1975), a majority of a panel of this Court held that a municipality could be held liable for damages in an action founded directly upon the 14th Amendment if the jurisdictional amount requirement of 28 U.S.C. §1331 was satisfied.

This Court, sitting en banc, reversed the decision of the Brault panel majority and dismissed the complaint. The Court did so on the ground that the complaint did not demonstrate any basis for a claim that the plaintiff's 14th Amendment rights had been violated. The en banc majority did not reach the question of substantive liability and municipal immunity under the 14th Amendment. 527 F. 2d at p. 738.*

(1)

Support for the Brault doctrine rests principally on the decision in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). The Brault panel majority found in Bivens "sweeping approbation of constitutionally based causes of action". Very respectfully, we find no such "sweeping approbation" in Bivens as would warrant radical extension of that 6-3 holding

*This same issue is presently sub judice in this Court in a case argued on October 3, 1977, Grant v. Board of Education, Docket No. 77-7161. On September 15, 1977, this Court issued an opinion in Gentile v. Wallen, Docket No. 77-7093, discussed below, which held that a direct 14th Amendment cause of action could be stated against a school board.

of the Supreme Court (Harlan, J., concurring but counselling restraint). Bivens imposed liability on the Federal agents themselves, in a classic tort situation, where the Court's opinion clearly exhibits concern that if plaintiff did not have a remedy in federal court, he would, as a practical matter, be remediless*. Further, Bivens does not, as the Brault majority appears to assume, necessarily sanction an award of money damages as the remedy for any violation of a constitutional right. Rather, it expressly recognizes that "special factors", including the question of who is to pay such damages, and the presence or absence of congressional declarations on the subject, must be considered in determining the appropriateness of this remedy. See 403 U.S. at p. 396-97.

Bivens is clearly distinguishable from the Brault situation in that in the later case we have specific evidence of congressional intent, expressed in Section 1983 and exhaustively documented in Monroe v. Pape, 365 U.S. 167 (1963), that municipalities should not be held liable in federal court for violations of the 14th Amendment.

*Thus, it has been argued that Bivens merely filled a statutory void by providing "otherwise unprotected victims of unconstitutional federal action the same remedy that section 1983 provides victims of similar conduct by state and local officials" subject to the same limitations. See, Livingood v. Townsend; 422 F. Supp. 24 (D. Minn., 1976). See, also, Monaghan, "The Supreme Court, 1974 Term-Forward: Constitutional Common Law," 89 Harv. L. Rev, 1, 23-24 (1975); "Note, Damage Remedies Against Municipalities For Constitutional Violations," 89 Harv. L. Rev, 922, 932 (1976).

(2)

The Court in Bivens recognized that the Fourth Amendment does not provide for its enforcement and proceeded to imply a remedy in damages where Congres had not taken affirmative action (p. 396). The Fourteenth Amendment, on the contrary, provides quite clearly, in Section 5, that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We submit that the power of enforcement conferred upon Congress by Section 5 is plenary and complete and has been exercised by it in the various civil rights laws. We further submit that the 14th Amendment vests no residual power in the judicial branch to create a cause of action not authorized by Congress to vindicate rights granted by that amendment.

When Senator Howard introduced the proposed 14th Amendment of the Constitution in the Senate on May 23, 1866, he said concerning Section 5:

> "It gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment. Without this clause, no power is granted to Congress by the amendment or anyone of its sections. It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no state infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it imposed upon Congress this power and duty." Cong. Globe, 39th Cong., 1st Sess., 2768.

Only thirteen years after the ratification of the 14th Amendment, the Supreme Court commented upon Section 5 in Ex Parte Virginia, 100 U.S. 313 (1879), a case challenging the Civil Rights Act of March 1, 1875. There the Court stated (at p. 346):

> "All of the Amendments derive much of their force from this latter provision [Section 5]. It is not said the judicial power of the General Government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged."

This same position was reiterated by Justice Harlan in his dissent in the Civil Rights Cases, 109 U.S. 3, 45-46 (1883), and reaffirmed by Justice Brennan in Katzenbach v. Morgan, 384 US. 641 (1966). In the latter case it is stated (at p. 651):

> "Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guaranties of the Fourteenth Amendment."

We do not suggest that the 14th Amendment would be a nullity without congressional action pursuant to Section 5. Obviously, the 14th Amendment, like any other provision of the Constitution, can be raised defensively in an appropriate forum. However, a cause of action to affirmatively vindicate 14th Amendment rights must be created by Congress, which is alone empowered to enforce

the 14th Amendment.* Indeed, Congress appears to have accepted this interpretation of its role under the 14th Amendment by its enactment of the predecessor statute of 42 U.S.C. §1983 and 28 U.S.C. §1343, the Act of April 20 1871.

The Congress which enacted the Act of April 20, 1871, had adopted the 14th Amendment less than three years before. It can be presumed that Congress had a clear view of its power under the Amendment. The Act of April 20, 1871 created a substantive cause of action to enforce the 14th Amendment (now 42 U.S.C. §1983) and gave jurisdiction over this cause of action to the federal courts (now 28 U.S.C. §1343(3)). Obviously, if the Congress believed that the 14th Amendment conferred upon the federal judiciary some residual power to enforce it through the creation of causes of action, it would not have created the substantive cause of action. If the analysis of the panel majority in Brault of its power to affirmatively enforce the amendment is correct, then Congress was wasting its time in creating a cause of action in the Act of April 20, 1871. All that was required was a jurisdictional provision.

*The 4th Amendment which was at issue in Bivens, unlike the 14th Amendment, at issue here, does not purport to confer enforcement power upon any branch of the government. It is, therefore, more susceptible to being interpreted as it was in Bivens, as conferring the power to enforce it jointly upon the legislative and judicial branches.

We submit that the 14th Amendment clearly contemplates its enforcement by the Congress; that the Congress has enforced it; and that the Courts are without power to create an additional remedy.

(3)

Assuming, but not conceding, that the federal courts retain some power to fashion affirmative remedies based upon the 14th Amendment, we submit that to do so in this case where the defendant is a municipality would be both inappropriate and unnecessary. As noted above, Congress created by the Act of April 20, 1871, a cause of action to enforce the 14th Amendment and conferred upon the federal courts jurisdiction to entertain actions to enforce such cause of action. This cause of action, however, has been repeatedly held by the Supreme Court not to apply to municipalities.

The "sweeping approbation" of constitutionally based causes of action that the Brault panel found in the Bivens decision, had been clearly qualified by the Bivens Court:

"The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." The Supreme Court then went on to indicate what it meant by "special factors" counselling hesitation:

> "Finally, we cannot accept respondents' formulation of the question as to whether the availability of money damages is necessary to enforce the Fourth Amendment.

> For we have here no explicit declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." Bivens, supra at p. 397 (emphasis added).

In the case at bar there is present the precise special factor counselling hesitation of which the Supreme Court warned in Bivens. The Supreme Court has made crystal clear Congress' intent to exclude municipalities from liability for violation of §1983, which creates an explicit statutory cause of action for violations of the 14th Amendment.

The Brault panel majority implied that the congressional intention to exempt municipalities from liability under the Act of April 20, 1871, was somehow vitiated by the passage of the Act of March 3, 1875. This statute (now, as subsequently amended, 28 U.S.C. §1331 (a)) gave to the federal courts original jurisdiction in civil actions wherein the matter in controversy was of a sum or value exceeding $500 (now $10,000) and arose under the Constitution, laws or treaties of the United States. The panel majority reasoned that in passing the Act of March 3, 1875, Congress decided that the municipal exemption from liability granted by the Act of April 20, 1871 was to be limited to cases in which the matter in controversy had a value less than the $500 jurisdictional amount required by the Act of March 3, 1875. In other words, the Act of March 3, 1875, empowered the federal courts to entertain a case which was based directly

on the 14th Amendment if the plaintiff's claim against the municipal defendant had a value in excess of the $500 jurisdictional amount. If, however, the claim was valued at less than $500, the plaintiff's only entry to the federal courts was pursuant to the Act of April 20, 1871 (now 42 U.S.C. §1983) which, while affording entry to the federal courts, unfortunately precluded recovery by virtue of its grant to municipalities of an exemption from liability. We submit that this peculiar jurisdictional scheme suggested by the panel's decision as a means of harmonizing its construction of 28 U.S.C. §1331 with Congress' intention to exclude municipalities from liability under 42 U.S.C. §1983 has no basis in the history of 28 U.S.C. §1331, and in fact makes no sense at all. It preserves the hard fought for municipal immunity from damages where the exposure to liability is trivial (less than $10,000; originally $500), but wipes out such immunity where the exposure is - to an unlimited extent - greater.

With the passage of the act of March 3, 1875, a vast expansion of the powers of the federal judiciary occurred. This immense expansion barely received a contemporary comment. Indeed, the Act, unlike the Act of April 20, 1871, evoked so little debate on the floor of the Congress that the Supreme Court has described the Act as "rather hastily passed." Lynch v. Household Finance Corp., 405 U.S. 538, 548 (1971). See Frankfurter

and Landis, The Business of the Supreme Court, pp. 65-69.

In Preiser v. Rodriguez, 411 U.S. 475 (1973), the Supreme Court held that the plaintiffs, who were prisoners seeking restoration of good-time, could not commence an action under 42 U.S.C. §1983 in order to avoid the requirement of habeas corpus that state court remedies must be exhausted before a federal action can be commenced. The Court stated at pages 489-490:

> "It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of §1983."

We submit that it would be inappropriate to imply a cause of action that would frustrate the clear congressional intention to immunize municipalities from liability.*

*Illustrative of the approach which we believe is here called for is the Supreme Court's decision in Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975), in which the Court declined to allow the award of counsel fees in federal courts in the absence of statutory authorization. First, Alyeska seems clearly to indicate that, to the extent that this court may have the power to adopt a particular rule, that raw, naked power of the judiciary does not answer the question of whether the rule should be adopted. It is not enough that the judiciary prefer a rule; other elements besides judicial power and preference must be considered. Second, and related to the first point, Alyeska indicates the deference which the courts should pay to congressional actions- whether, as there, the action be largely inaction to change existing law, or, as here, longstanding and continuing congressional action in the civil rights field indicating that body's unwillingness to extend Section 1983 liability to municipalities.

Creation of such a remedy would also be accomplished without the compelling necessity perceived by the Bivens court. An adequate federal remedy exists under §1983. A complete and adequate remedy is available in the state courts under CPLR Article 78 that provides for a damages award. Furthermore, the complaint here does not involve the sort of outrageous tortious conduct alleged in Bivens, which may more urgently require a vindication of constitutional rights.

(4)

In Paul v. Davis, 424 U.S. 694 (1976), the Supreme Court considered the issue whether petitioner's defamation by a police officer constituted a basis for relief under 42 U.S.C. §1983 and the 14th Amendment. The Court stated (424 U.S. at p. 701):

> "[Petitioner] apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, Griffin v. Breckenridge, 403 U.S. 88, 101-102 (1971); a fortiori the procedural guarantees of the Due Process Clause cannot be the source for such law."

Yet a "font" of federal tort law is precisely what this Court would create if it revived the Brault doctrine. The 14th Amendment, unlike the 4th Amendment, casts a wide net. Virtually every tort, contract, condemnation and zoning case in which a municipality is

involved can be framed in terms of a violation of the 14th Amendment and, under the Brault doctrine, it would appear that, as long as $10,000 in damages are alleged, entry into a federal forum is assured. The result in New York would be that the federal courts attain concurrent jurisdiction with the New York State Supreme Court in virtually every case in which the City is a defendant, inviting unprecedented opportunities for forum shopping by plaintiffs, and creating uncertainty as to the availability of the defenses against and the restrictions upon municipal liability that the states have created to protect their cities and towns.*

The Supreme Court has been at pains to reaffirm the continued vitality of the principle of federalism - even to the extent of invalidating congressional legislation. See National League of Cities v. Usery, 426 U.S. 833 (1976). We believe it is that same principle, even if not expressly referred to, which has guided and animated the Court in its decisions in Paul v. Davis, supra, and Bishop v. Wood, 426 U.S. 341 (1976), in both of

*Another factor counselling hesitation in the application of the Brault doctrine arises from the fact that the 14th Amendment is directed toward state action. Ironically, if the Board were in fact a state it would be immunized from liability via the 11th Amendment. The incongruity of holding a municipality a state for 14th Amendment purposes but not for the purpose of claiming immunity under the 11th Amendment was apparently brought home to Congress when it enacted Section 1983. See discussion of legislative debate, Monroe v. Pape, 365 U.S. 167, 190-91 (1960). See, also, City of Kenosha v. Bruno, 412 U.S. 507 (1973).

which cases the Court clearly suggested that the 14th Amendment was an inappropriate vehicle for attempting to right all alleged wrongs committed by local government officials. Under our Federal system the state legislature and judiciary have provided remedies in addition to the rights and remedies which Congress has seen fit to provide in the federal civil rights laws. Surely, a decent respect for both the role of Congress in legislating and the role of the states in our federal system counsels most strongly against judicial creation of new rights and remedies under the 14th Amendment, and this seems most clearly to be the view of the Supreme Court.

In sum, the existence of these "special factors", specifically considerations of federalism, the role of federal courts in fashioning constitutional remedies in the absence of congressional action, and the reluctance of the Supreme Court to extend liability to municipalities for alleged violations of their officers, counsels against the establishment of a direct 14th Amendment action against the City.*

We submit that the recent decision by a panel of this Court in Gentile v. Wallen, should not be followed. We do not dispute that a Court has subject matter jurisdiction

*This position has the support of several recent district court opinions. See, Raffety v. Prince George's Cty., 423 F. Supp. 1045, 1057 (D. Md., 1976); Livingood v. Townsend, 422 F. Supp. 24, 27 (D. Minn., 1976); Farnsworth v. Orem City, 421 F. Supp. 830, 831 (D. Utah 1976).

to consider the possibility of a 14th Amendment claim, under 28 U.S.C. §1331. However, the Court need not have gone farther, since it affirmed the District Court's grant of summary judgment in favor of defendants. In the same situation, this Circuit, sitting en banc in Brault, declined to decide the 14th Amendment question when it found that the complaint had to be dismissed on the merits. 527 F. 2d at p. 738. Similarly, in Fine v. City of New York, supra, the Court declined to reach the 14th Amendment question and, instead, decided the case on statute of limitations grounds. The Court wrote that, "we should not reach out to decide constitutional questions unnecessarily." 529 F. 2d at p. 76. The same approach was followed again in Buck v. Board of Education, 553 F. 2d 315 (2d Cir., 1976) and, by the Supreme Court, in Mt. Healthy City School District Board of Education v. Doyle ___ U.S. ___, 97 S. Ct. 568 (1977). Since this Circuit has already indicated its desire to hear this issue en banc, we think its purported resolution in a context that will permit no review is most unfortunate and flies in the face of the policy articulated whenever this issue has previously arisen. For these reasons, we think the decision in Gentile should be treated as dicta.*

*The decision does not indicate that the viewpoint of any judge of this Circuit has changed on this issue. For this reason, we respectfully suggest that if Gentile is to be followed as precedent, the question again be presented en banc.

We would also note that in all the cases cited in Gentile as supporting a Brault cause of action, the issue is discussed most perfunctorily, often in a footnote to the opinion. There is no indication of a reasoned analysis of this most difficult question.

CONCLUSION

The order and judgment appealed from should be affirmed, with costs.

November 10, 1977.

Respectfully submitted,

W. BERNARD RICHLAND
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the City of New York
Attorney for Appellees.

FRANCIS F. CAPUTO,
of Counsel.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

FRANCIS F. CAPUTO

being duly sworn, says that on the 10th day of November 1977

at No. 270 BROADWAY in the Borough of MANH in New York City, he served 3 copies

of the annexed Appellees' BRIEF upon JEREMIAH McKENNA Esq.

the Attorney for the APPELLANTS in the within entitled action, by delivering

a copy of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 10th
day of November 1977 } Francis F. Caputo

BRUCE S. GARNER
Commissioner of Deeds
City of New York No. 4-1786
Commission Expires May 1, 1978

Bruce Garner